DATE: September 6, 1995
CASE NO. 92-ERA-52

IN THE MATTER OF

RICHARD G. SMITH,

COMPLAINANT,

v.

RICHARD L. LITTENBERG, M.D.
AND HONOLULU MEDICAL GROUP,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

DECISION AND LIMITED REMAND ORDER

Earlier I remanded this case, which arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988),[1] to the Administrative Law Judge (ALJ) for a hearing and determination of the remedies to which Complainant Richard Smith is entitled. The ALJ's Recommended Decision and Order (R. D. and O.) is now before me. I adopt much of the ALJ's recommended order, including the findings of fact at 11-23, modify certain portions, and remand to the ALJ for a new recommendation concerning the attorney's fees award.

BACKGROUND

1. Procedural History

Smith complained to the Wage and Hour Administration of the Department of Labor that Respondents, Richard Littenberg, M.D., and Honolulu Medical Group (HMG), violated the ERA when Littenberg discharged Smith from his position as HMG's Chief Nuclear Medicine Technologist. The District Director of the Wage

and Hour Administration found that Respondents violated the ERA and ordered some of the relief that Smith sought. Although entitled to do so, 29 C.F.R. § 24.4, Respondents did not request a hearing before an ALJ. Smith, however, timely

requested a hearing to establish that he is entitled to additional remedies, including reinstatement to his former position.

An ALJ recommended dismissal of the complaint because, under his interpretation of the applicable regulation, a complainant may not seek a hearing in a case in which he prevailed before the Wage and Hour Administration.

On review of the ALJ's decision, I held that "either a complainant or a respondent aggrieved by the determination of the Wage and Hour Administrator has the right to *de novo* review by an ALJ." June 30, 1993 Decision and Remand Order at 6. I found that Smith was aggrieved because the District Director (acting for the Wage and Hour Administrator) did not order some of the relief that Smith sought, *i.e.*, reinstatement and other affirmative action to abate the violation. *Id.* Accordingly, I remanded the complaint to the ALJ for a hearing limited to the issue of the remedies to which Smith is entitled. *Id.* at 8. I noted that Respondents waived the right to a hearing on the issue of liability when they did not timely seek a hearing concerning the District Director's order. *Id.* at 8 n.5.

2. The ALJ's Recommended Decision and Order

Smith was disabled due to a workplace injury about one week prior to his unlawful discharge. He has waived entitlement to back pay after the date he began a new job, August 1, 1993. Tr. 32. The ALJ determined that Smith would have earned $49,004 between the date of his discharge and the date he began to work again.[2] From that amount, the ALJ subtracted the sum Smith received in temporary disability payments because of his work place injury, for a resulting award of $22,034.85 in back pay. R. D. and O. at 23, 29.

The ALJ also found that Smith was entitled to compensatory damages consisting of $10,000 for emotional distress, $10,000 for future psychiatric counseling, and ,250 for payment of a psychiatrist's fee. R. D. and O. at 32-33. The ALJ ordered payment of prejudgment interest on the amount owed for back pay and compensatory damages, with the exception of the amount for future psychiatric treatment. *Id.* at 36. He also ordered Respondents to pay Complainant's costs and attorney's fees. *Id.*

Concerning non-economic remedies, the ALJ ordered reinstatement to Smith's former position with the same terms and conditions that existed prior to his discharge. R. D. and O. at 36. He ordered Respondents to purge from their records all negative references to Smith's employment and his discharge. *Id.* Finally, the ALJ ordered Littenberg to correct in writing certain

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statements he had made about Smith to the Nuclear Regulatory Commission (NRC) and to HMG's insurance carrier for workers' compensation payments. *Id.* at 36-39.

PRELIMINARY ISSUE

Respondents ask me to strike the ALJ's discussion of whether they violated the ERA as "superfluous" under the earlier remand order. Resp. Br. at 1-2. The discussion is outside the scope of the remand order and I decline to adopt it. However, I need not

strike the discussion since it is part of a recommended, rather than a final, order. I reiterate my belief that Respondents conceded the liability issue when they declined to seek a hearing after the adverse finding of the District Director.

DISCUSSION

1. Economic Remedies

Respondents contend that the ALJ's back pay award is punitive because Smith was physically unable to work during the period of back pay. Resp. Br. at 2-9. Under a stipulation with the State of Hawaii, Smith received $26,969.15 for temporary total disability for the period between his discharge and starting a new job. RX 1.

Smith argues that under the collateral source rule, his disability payments should not be deducted from the salary he would have received during the back pay period. Comp. Br. at 3-5. Accordingly, he seeks his full salary as back pay.

The Secretary has held that the purpose of a back pay award is to restore a successful complaint to the same position he would have been in, if not for the unlawful discrimination. *Williams v. TIW Fabrication & Machining, Inc.*, Case No. 88-SWD-3, Sec. Dec. and Ord., June 24, 1992, slip op. at 14 (under Solid Waste Disposal Act); *Blackburn v. Metric Constructors*, Case No. 86-ERA-4, Sec. Dec., Oct. 30, 1991, slip op. at 11 (under ERA), *aff'd in relevant part and rev'd on other grounds, Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992).*

I recognize that Smith's disabling injury preceded his engaging in protected activity and the Respondents' violation of the ERA. Therefore, even if the unlawful discharge had not occurred, Smith still would have been physically disabled and unable to work during the period for which the ALJ awarded back pay. Tr. 131.

As ERA violators, however, Respondents should not receive the benefit of owing no back pay due to Smith's work place injury. The $22,034.85 in back pay that the ALJ awarded properly requires Respondents to restore to Smith the amount of salary that is above the payments received for temporary total disability.[3] Respondents shall pay prejudgment interest on the back pay amount, at the rate set forth in 26 U.S.C. § 6621, from the date of discharge until the date of payment.

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Contrary to Smith's argument that his disability payments should not be deducted from the amount of salary he would have earned, I have recognized that "workers' compensation awards that are identifiable as compensation for lost wages during a back pay period may be deducted from a back pay award." *Williams,* slip op. at 13 n.6. Smith's temporary disability payments constitute compensation for lost wages. *See Canova v. NLRB*, 708 F.2d 1498, 1504 (9th Cir. 1983) ("temporary disability payments are a substitute for lost wages during the temporary disability period").

Smith claims entitlement to damages for emotional and mental distress. Where a violation has been found, the ERA's employee protection provision permits the award of compensatory damages in addition to back pay. 42 U.S.C. § 5251(b)(2)(B);

29 C.F.R. § 24.6(b)(2) (1992). *DeFord v. Secretary of Labor,* 700 F.2d 281, 288 (6th Cir. 1983); *English v. Whitfield*, 858 F.2d 957, 964 (4th Cir. 1988). "In order to recover compensatory damages, [a complainant] need[s] to show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992); *Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978). The testimony of medical or psychiatric experts is not necessary, but it can strengthen a Complainant's case for entitlement to compensatory damages. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec. Dec. and Rem. Ord., Sept. 17, 1993, slip op. at 27-28; *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981).

Respondents contend that the record does not support the award of any compensatory damages. They point out that although Smith had several psychiatric evaluations, there is no record evidence that Smith received psychiatric treatment after his discharge. Resp. Br. at 10. Respondents submitted the evaluation of Dr. Stitham, a psychiatrist, who stated that Smith was not psychiatrically impaired and concluded that no psychiatric treatment was needed. RX 6 at 8-9.

On the other hand, a different psychiatrist, Robert Marvit, stated shortly after the discharge that Smith was "depressed, obsessing, ruminating, and ha[d] post traumatic problems." CX 17 at E-307. Upon a reexamination two years later, Dr. Marvit found that the discharge "has been extremely destructive on [Smith's] sense of self and view of the world," leading him to "engage[ ] in social withdrawal." CX 18 at 1. Dr. Marvit twice recommended psychiatric counseling.[4] CX 18 at 3; CX 17 at 5.

The ALJ, who observed Smith and evaluated all of the testimony, awarded $10,000 to compensate for the emotional and mental stress that the discharge caused. I affirm that award. *See*, e.g., *Tritt v. Fluor Constructors, Inc.*, Case No. 88-ERA-29,

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Dec. and Order of Remand, Mar. 16, 1995, slip op. at 8 (affirming ALJ finding that complainant was not credible on entitlement to compensatory damages). I also affirm the ALJ's order requiring Respondents to pay the $1250 fee for Dr. Marvit's 1994 psychiatric evaluation, which supported Smith's own testimony about emotional distress.[5]

I disagree, however, with the award of interest on compensatory damages. *See Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, Case No. 91-ERA-13, Sec. Dec. and Order, Oct. 26, 1992, slip op. at 16, and *McCuistion v. Tennessee Valley Authority*, Case No. 89-ERA-6, Sec. Dec. and Order, Nov. 13, 1991, slip op. at 24 (prejudgment interest awarded on back pay, but not on compensatory damages). Consequently, no prejudgment interest will accrue on the award of $10,000 for emotional distress and $1250 for the psychiatrist's bill.

Concerning the ALJ's award of $10,000 to cover future psychiatric counselling, R. D. and O. at 33, I note Dr. Marvit's 1994 statement that future therapeutic intervention is "not necessarily mandatory." CX 18 at 3. Consequently, I affirm the

requirement that Respondents pay Smith's future psychiatric fees, up to $10,000, but only if Smith avails himself of psychiatric counseling and presents the psychiatrist's bills to Respondents for payment.

2. Non-economic Remedies

The ERA provides that a successful complainant is entitled to reinstatement. 42 U.S.C. § 5851(b)(2)(B) (1988). I agree with the ALJ that the 1994 offer of reinstatement was not unconditional and that declining that offer did not constitute waiver of reinstatement. See R. D. and O. at 33-35. I find that Smith is entitled to reinstatement to his former position at HMG together with all of the benefits and privileges he formerly enjoyed, including the same hours of work and not being required to report in any way to the Director of Nursing.

Respondents object to the ALJ's order that they "expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's work for the Respondents and his termination. . . ." R. D. and O. at 35. I will amend this order to require Respondents to expunge from Complainant's personnel file all negative references to his discharge on May 22, 1992.

The ALJ ordered Respondent Littenberg to make a substantial number of written corrected statements concerning Smith to the NRC and to HMG's insurance carrier for workers' compensation. Respondents contend that it is improper to order such corrections, which they deem to be humiliating. Resp. Br. at 19.

"Affirmative action to abate a violation" has often included requiring the respondents to post in the work place a copy of the

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Secretary's decision. *See, e.g., Wells v. Kansas Gas & Elect. Co.*, Case No. 83-ERA-12, Sec. Dec. and Ord., June 14, 1984, *aff'd sub nom. Kansas Gas & Elect. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied,* 478 U.S. 1011 (1986) and *Landers v. Commonwealth-Lord Joint Venture*, Case No. 83-ERA-5, Sec. Dec. and Final Ord., Sept. 9, 1983, slip op. at 1, 3. Such a posting has the effect of correcting the record as to the real reason a respondent took an adverse action against a complainant.

Requiring Respondents to make corrected written statements to the NRC and the insurer will have a similar effect of correcting the record.[6] Accordingly, I affirm the corrective statements ordered by the ALJ in paragraphs 4 and 5 of the R. D. and O. at 36-39.

3. Attorney's Fees and Costs

On the basis of a hearing exhibit, CX 23, the ALJ awarded to Smith's counsel $32,010.44 in costs and attorney's fees for his services through June 30, 1994. R. D. and O. at 30. Smith thereafter submitted to me an updated petition to cover the fees and costs that had accrued from the date of hearing through November 30, 1994, for a total of $52,955.38. In that petition, Smith requested that "the award be made without prejudice to his right to petition for additional reasonable attorney fees, costs and expenses in the future since Complainant believes Respondents will continue to appeal . . . ." Complainant's Petition for

Additional Reasonable Attorneys Fees, Costs and Expenses at 2. The petition does not include the fees and costs associated with the briefs submitted to me in 1995.

Respondents object that the award includes fees for "matters other than the proceeding before the ALJ." Resp. Br. at 12-13 and Rebuttal Br. at 7. They also protest that the ALJ awarded the fees on the basis of a hearing exhibit rather than requiring the filing of a formal petition with opportunity for a response. *Id.*

The Secretary has authority to award only those fees "reasonably incurred . . . by the complainant for, or in connection with, the bringing of the complaint. . . ." 42 U.S.C. § 5851(b)(2)(B) (1988). Some of the listed items in the fee exhibit concern two court cases filed by Respondents, one in the Ninth Circuit and one in the United States District Court for the District of Hawaii.

I will remand to the ALJ, who shall afford Smith's counsel the opportunity to submit a detailed petition covering all the fees and costs incurred through submittal of that final fee petition. Respondents shall have the opportunity to respond. Both parties may also present additional argument concerning whether the fees and costs associated with the prior related court actions reasonably were incurred in connection with

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bringing this complaint. I note that I do not have authority to award costs or attorney's fees in connection with any future petition for review of a final administrative decision in this case. *See Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Final Dec. and Order, Dec. 27, 1994, slip op. at 2.

4. Proposed Findings of Fact and Conclusions of Law

Respondents argue that the ALJ violated the Administrative Procedure Act (APA) because he did not rule on their proposed findings of fact and conclusions of law. Resp. Br. at 20; Resp. Rebuttal Br. at 10. The APA, however, does not require a decision maker explicitly to accept or reject each of the parties' proposed findings and conclusions. By its terms, the APA requires only that a decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A). As the Ninth Circuit has explained, under the APA, "[a]n agency is not required . . . to furnish detailed reasons for its decision," which need only be "'sufficiently clear so that a court is not required to speculate as to its basis.'" *Lockert v. United States Dept. of Labor*, 867 F.2d 513, 517 (9th Cir. 1989), *quoting Lodi Truck Service, Inc. v. United States*, 706 F.2d 898, 901 (9th Cir. 1983). I find that the ALJ's decision was sufficiently clear and met all of the APA's requirements concerning findings and conclusions.

ORDER

1. Respondents immediately shall reinstate Complainant to his former position with HMG, with the same terms and conditions, including the same work hours and reporting requirements, that he enjoyed prior to his discharge on May 22, 1992.

2. Respondents shall pay Complainant $22,034.85 in back pay, together with interest thereon calculated according to 26 U.S.C.

§ 6621, from May 22, 1992 through the date of payment.

3. Respondents shall pay Complainant a total of $11,250.00 in compensatory damages, which includes payment of the fee for Dr. Marvit's 1994 psychiatric evaluation.

4. Respondents shall pay Complainant's bills for future psychiatric counseling as they accrue, up to $10,000.00. If Complainant does not present any such bills to Respondents for payment, Respondents shall have no obligation under this paragraph.

5. Respondents shall expunge from Complainant's personnel file all references to his discharge on May 22, 1992.

6. Respondents shall make corrected written statements as outlined in the R. D. and O. at paragraphs 4 and 5 at 36-39.

7. Consistent with the discussion above, this case is remanded to the ALJ to afford the parties the opportunity to present a petition, response, and argument concerning

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Complainant's costs and attorney's fees. The ALJ shall issue a recommended supplemental decision and order setting forth his findings on the issue.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the ERA for claims filed on or after its date of enactment, October 24, 1992.

The amendments do not apply to this case, in which the complaint was filed in June 1992.

[2]
A new ALJ was assigned to the case upon remand.

[3]
The amount Smith received as settlement for his permanent partial disability is not deductible from the back pay. *Williams*, slip op. at 13 and n.6; *Canova v. NLRB*, 708 F.2d 1498, 1504 (9th Cir. 1983).

[4]
I have found a complainant entitled to compensatory damages when he did not seek professional counseling for the emotional distress caused by the unlawful discharge. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-04, Final Order on Compensatory Damages, Aug. 16, 1993, slip op. at 3-4.

[5]
Both parties agree that Dr. Marvit's bill was included in Smith's listing of costs and attorney's fees, CX 23. Since I am ordering payment of the bill as part of the compensatory damages, it should not also be included in any award of attorney's fees and costs.

[6]
I disagree with Respondents' argument that requiring them to make corrected statements to the NRC "in effect" overrules the NRC's independent investigation. Resp. Br. at 17-18. To the contrary, the NRC is free to decide what action to take, if any, in light of the corrected statements.